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International Arbitration: The Need for Uniform Interim Measures of Relief

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INTERNATIONAL ARBITRATION: THE NEED FOR UNIFORM INTERIM MEASURES OF RELIEF

I. INTRODUCTION

In recent years, international commercial arbitration has experienced a rapid expansion in use.[1] Since the post-World War II era, the arbitration field expanded considerably in the context of international trade and commerce.[2] The General Agreement on Tariffs and Trade[3] tremendously aided arbitration by leading to a substantial reduction in tariff barriers to trade and a resulting increase in the level of international trade of goods.[4] Increasing international trade led to more disputes between states, private companies, businesses, and persons. International arbitration institutions flourished, and many jurisdictions passed new or updated international arbitration statutes.[5]

International commercial arbitration has advantages and disadvantages when compared to other forms of dispute resolution.[6] Some advantages include neutrality of forum, speed, lower cost, informality, enforcement, language, and confidentiality. Some disadvantages include lack of coercive powers, diffi-

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1. For a discussion regarding the increased use of arbitration, see generally PIETER SANDERS, QUO VADIS ARBITRATION? 9 (1999). *See also* Charlotte L. Bynum, *International Commercial Arbitration*, ASIL Guide to Electronic Resources for International Law (Mar. 2001), *at* http://www.asil.org/resource/arb1.htm.

2. *See* OKEZIE CHUKWUMERIJE, CHOICE OF LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 15 (1994). Also see James E. Meason & Alison G. Smith, *Non-Lawyers in International Arbitration: Gathering Splinters on the Bench*, 12 NW. J. INT'L L. & BUS. 24, 26–31 (1991), for a brief overview of international trade and its effect on international arbitration.

3. General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194, T.I.A.S. No. 1700 (entered into force in Jan. 1, 1948).

4. *See* CHUKWUMERIJE, *supra* note 2, at 6.

5. *See generally* Clifford Larsen, *International Commercial Arbitration*, ASIL INSIGHT (Apr. 1997), *at* http://www.asil.org/insights/insight6.htm.

6. For a discussion regarding the advantages and disadvantages of arbitration, see SANDERS, *supra* note 1, at 2–9. *See also* RICHARD GARNETT ET AL., A PRACTICAL GUIDE TO INTERNATIONAL COMMERCIAL ARBITRATION (2000).

culty with multiparty disputes, and inability to appeal. Regardless of whether arbitration is more advantageous or disadvantageous to international commerce, it is unquestionable that the use of international arbitration has grown and is still growing.[7]

Arbitration is an attractive alternative to litigation because parties choose their own neutral dispute resolution forum.[8] Parties tend to prefer settlement in a neutral forum, rather than submitting to the jurisdiction of another party's home nation.[9] In addition, arbitration tends to resolve matters expeditiously because there is no court backlog and parties set their own schedules. However, due to the increase of international arbitration and the procedures of selecting forums and arbitrators, the length of time necessary to complete an arbitration has also become increasingly long.[10] While consideration must be given to the fact that the arbitrators have to be paid (whereas judges of a court do not), it is not unusual to hear the suggestion that arbitration is cheaper than litigation.[11] Finally, parties tend to prefer arbitration because it is typically non-public, allowing companies with long-standing relationships to resolve their disputes away from public scrutiny.[12] Most importantly, arbitration is seen as providing the best chance to save the underlying business relationship.[13]

However, the system of international arbitration does have its drawbacks. A major disadvantage of arbitration is the arbitral tribunal's lack of coercive power necessary to support the process.[14] Such powers might be required to compel discovery, the attendance of witnesses, or in the extreme, control over the movement of the parties and their assets. An arbitrator has no

7. For a general discussion, see Michael Pryles, *The Growth of International Arbitration*, *at* http://www.ag.gov.au/www/rwpattach.nsf/viewas attachmentPersonal/0417185A03AF31B7CA256C8A00025187/$file/Growth INtArb.pdf (last visited June 7, 2003).

8. *See* GARNETT, *supra* note 6.

9. *See* Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L L. 79, 95 (2000).

10. *See* Larsen, *supra* note 5.

11. *See* CHUKWUMERIJE, *supra* note 2, at 8.

12. *Id.*

13. *See generally*, Drahozal, *supra* note 9. *See also* Meason, *supra* note 2.

14. *See* SANDERS, *supra* note 1. *See also* GARNETT, *supra* note 6, at 15.

coercive power over third parties.[15] Multiparty disputes are an area where the tools of traditional litigation may be more helpful than arbitration.[16] In many complicated commercial matters, there may be many interrelated contracts and parties, each with the potential for bilateral but related disputes. In this scenario, it may be desirable to hear all the related disputes concurrently; however, the arbitration process depends on party autonomy and does not have the liberal joinder rules present in litigation.[17] Thus, under certain circumstances, litigation may offer a more practical forum for resolution of claims.

International arbitration also has other significant discrepancies and dilemmas that need to be resolved. Another drawback of the current state of international arbitration, which will be addressed by this Note, is the lack of uniform granting and enforcement of interim measures in aid of arbitration.

This Note will argue that, in order for the system of international commercial arbitration to function effectively, a uniform procedure for the awarding and enforcement of interim measures of relief is necessary. Interim measures are an absolute necessity to protect what is at stake in the arbitration. Regardless of whether evidence, real property, personal property, or financial assets needs to be preserved, there must be an effective procedure for maintaining the status quo. Without the protection of such provisional remedies, the outcome of the arbitration could become meaningless to the winning party.

In Parts I and II, this Note will discuss background information concerning international arbitration and provisional remedies, examining in particular the International Chamber of Commerce ("ICC") Arbitration Rules,[18] the United Nations ("UN") Commission on International Trade Law ("UNCITRAL") Arbitration Rules,[19] the UNCITRAL Model Law,[20] the American

15. *See* GARNETT, *supra* note 6, at 15.

16. *Id.*

17. *Id.*

18. *See* ICC Arbitration Rules (1998), *reprinted in* COMPARISON OF INTERNATIONAL ARBITRATION RULES (John J. Kerr, Jr. et al. eds., 2d ed. 2002), *available at* http://www.iccwbo.org/court/english/arbitration/rules.asp.

19. *See* United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules (1976), *reprinted in* COMPARISON OF INTERNATIONAL ARBITRATION RULES, *supra* note 18, *available at* http://www.uncitral.org/english/texts.

Arbitration Association ("AAA") International Arbitration Rules[21], and the London Court of International Arbitration ("LCIA") Arbitration Rules.[22] This Note will also examine the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"),[23] the primary enforcement tool of international arbitration. Part III presents the legal framework of the system of international arbitration. Part IV discusses the problem of interim measures within this legal framework. Part V examines various approaches which have been used in attempting to solve this problem, and the final section presents recommendations for resolution of the dilemma.

II. BACKGROUND

A. Legal Framework for International Arbitration

1. The Arbitration Agreement

International arbitration differs from international litigation in that arbitrating parties determine to a large extent what procedural rules will govern the resolution of their dispute and who will decide their dispute.[24] The legal basis for arbitration lies in an agreement by parties to submit disputes to an arbitral tribunal.[25] The arbitration agreement defines the issues to be addressed by arbitration and the jurisdiction of the tribunal.[26] The arbitration agreement also evidences the consent of the

20. UNCITRAL Model Law on International Commercial Arbitration, United Nations Commission on International Trade Law, U.N. Doc. A/40/17, (1985), Annex I, *available at* http://ww.uncitral.org/english/texts (last visited May 21, 2003).

21. *See* American Arbitration Association ("AAA") International Arbitration Rules, *reprinted in* COMPARISON OF INTERNATIONAL ARBITRATION RULES, *supra* note 18, *available at* http://www.adr.org.

22. *See* London Court of International Arbitration ("LCIA") Arbitration Rules (1998), *reprinted in* COMPARISON OF INTERNATIONAL ARBITRATION RULES, *supra* note 18, *available at* http://www.lcia-arbitration.com/download/rules.pdf.

23. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 30 U.N.T.S. 3 (1958) [hereinafter New York Convention].

24. *See* Larsen, *supra* note 5.

25. *See* GARNETT, *supra* note 6, at 19.

26. *Id.*

parties to arbitrate. Thus, where a dispute arises between parties who have entered into a contract containing an arbitration agreement, the parties, subject to few exceptions, are obligated to resolve their disputes according to the agreement.[27] The parties must decide whether they wish to refer to and adopt the processes of a particular institution, or tailor their own process on an ad hoc basis.[28] Depending on which form is chosen, parties may use recommended clauses of arbitral institutions.[29]

2. Institutional arbitration

If the parties choose institutional arbitration, they agree to submit their dispute to an institution, who will administer the arbitration. Under this system, care must be taken to ensure clear and accurate reference to the relevant institution.[30] Some of the most common institutions include the AAA, ICC, or LCIA. An agreement for institutional arbitration can resolve most of the procedural and jurisdictional questions simply through reference to the institution and its procedural rules.[31]

3. Ad hoc arbitration

In an ad hoc arbitration, the parties have the freedom to specifically choose the rules by which their arbitration will be governed. If the parties choose ad hoc arbitration, greater care needs to be given to identifying various procedural issues. A simpler alternative to trying to design a complete ad hoc procedural system is to designate one of the established procedural rule systems.[32] One of the more common ad hoc arbitrations is one where the parties agree to arbitration by the UNCITRAL Arbitration Rules, with various modifications.[33]

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27. *Id.*

28. For a brief discussion of ad hoc versus institutional arbitration, see MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION LAW AND PRACTICE 4 (2001).

29. *See* GARNETT, *supra* note 6, at 33. *See also* Dispute Resolution Services Worldwide, *About Us, Resolving Commercial Financial Disputes — A Practical Guide* (2003), *at* http://www.adr.org (including sample arbitration clauses).

30. *See* GARNETT, *supra* note 6, at 34.

31. *Id.*

32. *Id.*

33. *See* Larsen, *supra* note 5.

B. Lex Arbitri

The *lex arbitri,* also know as the *lex loci arbitri,*[34] is the law governing the arbitration.[35] All matters relating to the conduct and procedure of the arbitration are subject to this law.[36] For example, questions of how arbitrators are appointed, how they can be challenged, their powers for admission of evidence, and what remedies they can award, are all subject to the ultimate control of the law of the arbitration.[37]

Under the choice of law rules of almost all national legal systems, the basic rule applied is the "seat theory,"[38] that is, the law of the arbitration will be the law of the place where the arbitration is situated. It is also possible that the *lex arbitri* may be a different national law than that governing the substance of the parties' dispute or governing the arbitration agreement.[39] In international commercial arbitration practice, it is rare for parties specifically to choose the *lex arbitri*, and the choice of the place of arbitration is now recognized as shorthand for the method of selection of that law.[40]

34. *See* RUBINO-SAMMARTANO, *supra* note 28, at 511.

35. GARNETT, *supra* note 6, at 20.

36. *Id.*

37. *Id.*

38. The "seat theory" is the idea that the *lex arbitri*, or the law governing the arbitration, is based on the law of the nation where the "seat" of the arbitration is, or the state where the arbitration takes place. *See* Tatsuya Nakamura, *The Place of Arbitration in International Arbitration — Its Fictitious Nature and Lex Arbitri*, 15 MEALEY'S INT'L ARB. REP. 23 (2000).

39. *See, e.g., id.* at 26. French scholars maintain that French law does not take the traditional approach of the "seat theory," but takes a liberal approach of recognizing the freedom of the parties to choose the law applicable to the arbitral procedure.

40. The trend in recent years has been to substitute the words "place of arbitration" for "seat of arbitration." *See* FOUCHARD, GAILLARD, GOLDMAN, ON INTERNATIONAL COMMERCIAL ARBITRATION, ¶ 1239, n.94 (1999). *See also* YVES DERAINS & ERIC SCHWARTZ, A GUIDE TO THE NEW ICC RULES OF ARBITRATION (1998).

C. Sources of Law

1. The UNCITRAL

Although the UNCITRAL is not an arbitral institution,[41] the UNCITRAL Rules can be adopted by the parties to an ad hoc or institutional arbitration.[42] The AAA, the most active arbitral institution in the United States ("U.S."), allows arbitrations to be conducted using the UNCITRAL Rules.[43]

The UN General Assembly approved the UNCITRAL Rules on December 15, 1976.[44] The UNCITRAL is not an arbitral institution because it does not administer arbitration.[45] Instead, other arbitral institutions have typically agreed to allow parties to adopt the UNCITRAL rules for their arbitration instead of the institution's own rules.[46] In fact, some institutions have adopted the UNCITRAL rules as their own arbitration rules.[47] The UNCITRAL arbitration rules are unique in providing for an Appointing Authority ("A.A.").[48] If the parties cannot reach agreement on the composition of the arbitral tribunal, the A.A. has the final decision-making power. If the parties fail to agree on the A.A.'s identity, then the Secretary General of the Permanent Court of Arbitration, in The Hague,[49] designates the A.A.[50] Article 26 specifically deals with the granting of interim measures of relief.

The UNICTRAL Model Law ("M.L.") was another achievement of the UNCITRAL in the field of arbitration. On June 21,

41. *See* PIETER SANDERS, THE WORK OF UNCITRAL ON ARBITRATION AND CONCILIATION (2001).

42. *See* Larsen, *supra* note 5.

43. *See* SANDERS, *supra* note 37, at 1.

44. *Id.*

45. *Id.*

46. For example, the AAA commonly allows arbitrations to be administered under the UNCITRAL Arbitration Rules.

47. *See* SANDERS, *supra* note 41, at 1.

48. The Appointing Authority is a neutral party who may decide issues dealing with the arbitration if the parties are unable to reach agreement on these matters. *See* SANDERS, *supra* note 41.

49. See http://www.pca-cpa.org for more information on the Permanent Court of Arbitration at The Hague.

50. *See* SANDERS, *supra* note 41, at 1.

1985, the Commission adopted the text of the M.L.[51] The General Assembly approved the M.L. on December 11, 1985,[52] and requested the transmittal of the text to member states and arbitral institutions together with the *travaux preparatoires.*[53] Today, forty-seven individual jurisdictions from all parts of the world have adopted the M.L.[54] Some countries have adopted the M.L. as both their domestic arbitration law and their international arbitration law, while others prefer two separate regimes of law.[55] Even countries that have not adopted the M.L. have clearly taken the M.L. into account, as evidenced by the English Arbitration Act of 1996.[56] M.L. Articles 9 and 17 govern interim measures of relief.

2. The International Chamber of Commerce

The oldest and perhaps best-known arbitral institution is the ICC. Located in Paris, the ICC also has its own separate set of rules for arbitration.[57] The ICC does not actually "decide" arbitrations but rather administers the arbitration, helping to select arbitrators, receiving and distributing pleadings, and reviewing awards for technical accuracy.[58]

The ICC founded the International Court of Arbitration ("ICC Court") in 1923, in order to place at the disposal of business an international organization capable of settling international

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51. *See* PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION IN UNCITRAL MODEL LAW JURISDICTIONS (2000).

52. G.A. Res. 72, U.N. GAOR, 40th Sess. (1985), *available at* http://www.un.org/documents/ga/res/40/a40r072.htm.

53. The *travaux preparatoires* are analytical commentaries by the UNCITRAL's Secretary-General and the Report of the Commission. See http://www.uncitral.org/en-index.htm for a comprehensive list of the various *travaux preparatoires* available by the UNCITRAL.

54. *See* BINDER, *supra* note 51, at 8. For a comprehensive list of all forty-seven jurisdictions who have adopted the UNCITRAL M.L. in whole or part, see *id.* at 9-10.

55. *See* SANDERS, *supra* note 41, at 23. For a brief description regarding the different types of adoption of the M.L., see BINDER, *supra* note 51, at 11.

56. For a general discussion of how the English Arbitration Act of 1996 takes into account the UNCITRAL M.L., see William W. Park, *The New English Arbitration Act*, 13 No. 6 MEALEY'S INT'L ARB. REP. (1998).

57. *See* DERAINS, *supra* note 37.

58. For a description of the role the ICC plays in arbitration, see W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION (3d ed. 2000).

commercial disputes without recourse to formal legal procedure.[59] The ICC Court has administered nearly 10,000 international arbitration cases and has become widely known as the leading institution for arbitration of international commercial disputes.[60] The ICC Court, unique in its composition and role, monitors all ICC arbitral proceedings.[61] Its many functions include: whether or not to accept an arbitration; whether to permit joinder of arbitration; designating arbitrators; confirming the appointment of arbitrators; and most notably, reviewing of arbitrators' awards.[62]

The ICC Arbitration Rules ("ICC Rules") are commonly said to have as one of their fundamental characteristics a "universal" character, meaning they are intended for use in any country, under any law, and in accordance with any system of legal procedure.[63] The ICC Rules are generally accepted as flexible and autonomous, however, there is also a high degree of institutional involvement in the supervision of the arbitral process.[64]

The ICC also has other formal dispute resolution mechanisms. Through its National Committees,[65] the ICC endeavors to uphold the ultimate quality and efficacy of the arbitral process.[66] The National Committees appoint members to the ICC Court, assist in selection of arbitrators, and can be of assistance in obtaining voluntary compliance with an award by a recalcitrant party.[67]

In 1995, the ICC Commission of International Arbitration ("Commission")[68] appointed a Working Party[69] to make proposals

59. *See* DERAINS, *supra* note 40.

60. *Id.* at 1.

61. See http://www.iccwbo.org/court/english/intro_court/introduction.asp, for a general description of the court and its role.

62. *See* DERAINS, *supra* note 40, at 3.

63. *Id.* at 3.

64. *See* CRAIG ET AL., *supra* note 58, at 28.

65. The National Committees and groups ensure that the ICC takes account of their national business concerns in its policy recommendations to governments and international organizations. For an overview of ICC procedure, see generally ICC, *How the ICC Works*, http://www.iccwbo.org/home/intro_icc/how_works.asp (last visited June 7, 2003)

66. *See* DERAINS, *supra* note 40, at 3.

67. *Id.* at 4.

68. The ICC Commission was formed to examine the Arbitration Rules and make determinations about what changes were necessary.

69. The Working Party suggested general changes to the ICC Rules.

to the Commission concerning the possible need for rule changes. A major issue addressed by the group was the need for clarification over the availability of interim measures.[70] The Working Party reported to the Commission that it proposed to undertake a general examination of the ICC Rules with a view to suggesting revisions that would assist practitioners, since many changes to a well-known body of rules, such as the ICC Rules, should not be made too frequently.[71] The Working Party's changes did not fundamentally alter the ICC system of Arbitration.[72] However, the rules governing interim measures of relief were changed. The former Rules did not explicitly state whether ICC arbitrators could grant interim measures of relief.[73] This was a great source of uncertainty. The revised ICC Rules, through Article 23, makes clear that arbitrators possess the power to grant interim remedies.

3. The AAA

The AAA is another institution available to resolve a wide range of disputes through arbitration.[74] Founded in 1926, the AAA is an independent, non-profit organization headquartered in New York with regional offices throughout the U.S.[75] The AAA holds lists of arbitrators, and international arbitrations are regulated by the AAA Commercial Arbitration Rules.[76] The AAA amended their version of arbitration rules, rendered effective September 1, 2000.[77] The rules are intended to provide ef-

70. *See* DERAINS, *supra* note 53, at 7.

71. *Id.* Changes to a well known body of rules should not be made too often because it harms the stability of the institution's rules and makes it seem more arbitrary, like they can be changed at will.

72. For a description of the various changes made by the 1998 Rules, see Filip De Ly, *The 1998 ICC Arbitration Rules*, 1 INT. A.L.R. 1998, at 220–31. *See also* W. LAURENCE CRAIG, ANNOTATED GUIDE TO THE 1998 ICC ARBITRATION RULES (1998).

73. See GUIDE TO ICC ARBITRATION, ICC Publication No. 448(E) (1994), for a set of the ICC Arbitration Rules prior to the 1998 amendments.

74. *See* AAA, *About Us*, *A Brief Overview of the American Arbitration Association* (2003), *at* http://www.adr.org/index2.1.jsp?JSPssid=15765.

75. *See* PROVISIONAL REMEDIES IN INTERNATIONAL COMMERCIAL ARBITRATION (Alex Bosch ed., 1994).

76. *Id.* at 10

77. AAA International Arbitration Rules, *supra* note 21.

fective arbitration services to world business, through the use of administered arbitration.[78]

4. The LCIA

The LCIA is a very popular European international arbitral forum.[79] The institution is comprised of the Chamber of Commerce, the Corporation of the City of London, and the Institute of Arbitrators.[80] The procedure for interim measures is regulated by the LCIA International Arbitration Rules, as revised on January 1, 1985.[81] As with ICC and AAA arbitration, the LCA Court is responsible for the organization and administration of the procedure and in particular for the appointment of the arbitrators.[82]

D. Enforcement

1. The New York Convention

The New York Convention[83] is the most important enforcement treaty in international arbitration.[84] The treaty binds nations to recognize and enforce arbitral awards from foreign jurisdictions.[85] The New York Convention was a substantial improvement upon the Geneva Convention of 1927, since it provided a simple and effective method of obtaining recognition and enforcement of foreign awards.[86] The New York Convention has been described as "the single most important pillar on which the edifice of international arbitration rests"[87] and as a convention which, perhaps could lay claim to be the most effective instance of international legislation in the entire history of

78. *See supra* Part I.

79. See LCIA, *Arbitration; Rule, Clauses & Costs, at* http://www.lcia-arbitration.com/arb/ (last visited June, 7 2003), for an overview of the LCIA and arbitration.

80. *Id.*

81. LCIA Arbitration Rules, *supra* note 22.

82. *Id.*

83. New York Convention, *supra* note 23.

84. *See* Larsen, *supra* note 5.

85. *See* New York Convention, *supra* note 23, at pmbl.

86. *See* ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 455 (1999).

87. J. Gillis Wetter, *The Present Status of the International Court of Arbitration of the ICC: An Appraisal*, 1 AM. REV. INT'L ARB. 91 (1990).

commercial law.[88] The New York Convention established a new legal regime favoring international arbitration through the facilitation of recognition and enforcement of arbitral agreements and awards.[89]

As of January 1, 2001, 127 states were parties to the New York Convention.[90] The goal of the New York Convention is to facilitate the recognition and enforcement of both agreements to arbitrate[91] and arbitral awards.[92] Although the convention generally provides that arbitral awards made in any foreign state are to be recognized and enforced,[93] it specifically allows ratification with reservations limiting recognition and enforcement to awards made in the territory of another contracting state (the "reciprocity" reservation), and awards considered "commercial" under the national law of the Contracting State.[94] The U.S. included both reservations in its ratification.[95] Along with the Federal Arbitration Act,[96] the New York Convention is a critical source of law for international arbitration in the U.S.

As long as there is a written agreement to arbitrate, courts of contracting states are required to enforce that agreement by referring the parties to arbitration, "unless it finds that the said agreement is null and void, inoperative or incapable of being performed."[97] Recognition and enforcement of an arbitration agreement or award may only be refused upon limited grounds. The New York Convention identifies five grounds on which recognition and enforcement of a Convention award may be refused at the request of the party against whom it is invoked.[98] If

88. Lord Mustill, *Arbitration: History and Background*, 6 J. INT'L ARB. 43 (1989).

89. *See* CRAIG ET AL., *supra* note 58, at 679–81.

90. See United States Treaty Collection, *at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/part1/chapterXII/treaty1.asp (last visited June 7, 2003), for a comprehensive list of the 24 signatory states and the 127 states which are parties to the treaty.

91. New York Convention, *supra* note 23, art. II

92. *Id*. art. III

93. *Id*. art. I(1).

94. *Id*. art. I(3).

95. *See* Alan Scott Rau, *The New York Convention in American Courts*, 7 AM. REV. INT'L ARB. 213 (1997).

96. Federal Arbitration Act, 9 U.S.C. § 1 (1947).

97. New York Convention, *supra* note 23, art. II(3).

98. *See* REDFERN & HUNTER, *supra* note 86, at 459.

the opposing party can prove: (1) the incapacity of the parties or invalidity of the arbitration agreement; (2) improper notice or other lack of due process; (3) an award beyond the scope of the agreement to arbitrate; (4) improper arbitral procedure or composition of the arbitral board; or (5) that the award has been set aside or suspended or is otherwise not binding, then recognition or enforcement may be refused.[99] In addition, Article V(2) of the Convention provides that recognition or enforcement may be refused if the subject matter of the dispute is not capable of settlement by arbitration under the enforcing state's laws or if recognition or enforcement would be contrary to the public policy of that state.[100]

2. The Role of National Courts

In an address to an international arbitration conference, Lord Mustill compared the relationship between the courts and arbitrators to a relay race:

> Ideally, the handling of arbitrable disputes should resemble a relay race. In the initial stages, before arbitrators are seized of the dispute, the baton is in the grasp of the court: for at that stage there is no other organization which could take steps to prevent the arbitration agreement from being ineffectual. When the arbitrators take charge they take over the baton and retain it until they have made an award. At this point, having no longer a function to fulfill, the arbitrators hand back the baton so that the court can in case of need lend its coercive powers to the enforcement of the award.[101]

In principle, the relationship between the public world of the courts and the private world of arbitration should not give rise to any significant conflict.[102] At the beginning of the arbitral process, both under domestic legislation and under international treaties, such as the New York Convention, it is the courts — and not the arbitrators — who must enforce the agree-

99. New York Convention, *supra* note 23, art. V(1).

100. *Id*. art. V(2).

101. Lord Mustill, *Comments and Conclusions, in* CONSERVATORY & PROVISIONAL MEASURES IN INTERNATIONAL ARBITRATION, 9th Joint Colloquium (ICC Publication 1993) [hereinafter CONSERVATORY MEASURES].

102. *Id.*

agreement to arbitrate.[103] Again, at the end of the process, it is the courts that must enforce the arbitral award.[104] Thus, although parties tend to agree to arbitration in an effort to avoid courts, the court system plays an essential role in the framework of arbitration.

III. INTERIM MEASURES UNDER THE LEGAL FRAMEWORK — PROBLEMS

A. Various Types of Interim Measures

In arbitral proceedings, the need often arises for provisional remedies or other interim measures of relief. These measures are often needed because, in reality, arbitral proceedings are no less adversarial than litigation in public courts. The idea that provisional remedies are unnecessary or inadequate in arbitral proceedings is to confuse arbitration with conciliation.[105] These interim measures take on different forms and are often called different names. In the UNCITRAL M.L. and UNCITRAL Rules, they are called "interim measures of protection."[106] In the English version of the ICC Rules, they are known as "interim or conservatory measures,"[107] in the French version as "*mesures provisoires ou conservatoires,*"[108] and in the Swiss law governing international arbitration they are referred to as "provisional or protective measures."[109]

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103. *Id.*

104. *Id.*

105. Conciliation is an informal process designed to create an environment where negotiations take place. Arbitration, on the other hand, is a form of private adjudication where a mutually acceptable third party hears arguments from either side in a dispute and renders a judgment. The judgment, known as an award, is confidential and binding. For a discussion regarding conciliation and its differences with arbitration, see JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? RESOLVING DISPUTES WITHOUT LAWYERS 96–97 (1983).

106. *See* REDFERN & HUNTER, *supra* note 86, at 345–46.

107. ICC Arbitration Rules, *supra* note 18, art. 23.

108. French Code of Civil Procedure Code (Noveau code de procedure civile), Book IV, Arbitration, *reprinted in* INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, Annex I (Jan Paullson ed., 2002).

109. Swiss Private International Law Act, 1987, c. 12, art. 183, *reprinted in* INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, Annex II (Jan Paullson ed., 2002).

Provisional remedies and interim relief come in many forms, depending on the parties involved and context of the dispute. However, most often these remedies entail either the seizure of property, often called attachments or holding orders, or interim orders, also known as injunctions.[110] In attachment proceedings, the intention of the petitioner is to preserve the assets representing the subject matter or being necessary for enforcement of the arbitration award.[111] These orders are designed to prevent dissipation of the property or to preserve the condition of the property for future inspection.[112] Alternatively, a litigant may be ordered to deposit property into the custody of a third party.[113]

Another type of interim measure is an order to preserve the status quo between the parties pending the resolution of the merits of their dispute. For example, a party may be ordered not to take certain steps, such as terminating an agreement, disclosing trade secrets, or using disputed intellectual property or other rights, pending a decision on the merits.[114] In the interest of preserving the status quo, ICC tribunals have been willing to order a contract to be performed for a limited period, even though one party claims that the contract was rescinded.[115] The provisional relief of preserving the status quo can be provided either by the arbitrator or by the public courts, during the course of, and in conjunction with, the arbitral proceedings.[116] Issues often arise as to whether arbitral tribunals or national courts have the power to order such relief.[117] The arbitral tribu-

110. For a discussion regarding the differences between holding measures and interlocutory injunctions in international arbitration, see RUBINO-SAMMARTANO, *supra* note 28, at 631–33.

111. *See* Bosch, *supra* note 75, at 4-5.

112. *See* GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 920 (2001).

113. *Id.*

114. *Id.* at 921.

115. CRAIG ET AL., *supra* note 58, at 463. In ICC Arbitration Case 6503/1990, 1995 JOURNAL DU DROIT INTERNATIONAL 1022, the arbitral tribunal ordered that a long term contract should remain in existence, and the parties should exercise its terms during a period of one year after the claimed date of rescission, to permit the arbitral tribunal to rule on the merits of the claimed rescission and to avoid unnecessary damage.

116. *See* Bosch, *supra* note 75, at 4.

117. *See* REDFERN & HUNTER, *supra* note 86, at 354.

nal must look to the set of arbitration rules under which it is operating to determine if such jurisdiction is granted.[118] The courts, on the other hand, may have the power to act, but must determine whether it would be appropriate to do so.[119]

Parties may also seek orders requiring adverse parties to post security for satisfying the final judgment in the case.[120] Orders for security may be for either the amount in dispute in the underlying controversy or for the fees of legal representation and other costs to be incurred in resolving the dispute.[121] In ICC arbitration, security for costs is usually not granted, nevertheless, the power exists and in some circumstances may be justified.[122] Other interim measures of relief may include: orders for payment of part of the claim, orders to comply with the arbitration rules, orders to a party to act or omit, or orders and recommendations of holding measures.[123]

Interim measures are incredibly controversial in international arbitration because of the inherent risks involved in granting such orders. First, there is a risk that the issuance of an interim order will represent factual victory in the main proceeding for the petitioner.[124] Even though the decision is only interlocutory, its consequences can often be irreparable. Additionally, there is a risk that the petitioner is being abusive in its use of the request for an interim order. Parties often do not use proceedings for provisional remedies solely to secure later enforcement of an award, but in reality use a petition for an in-

118. *Id.*

119. *Id.* The famous English case of Channel Tunnel Group Limited v. Balfour Beatty Construction Limited, [1993] A.C. 334 (Lord Mustill), XIX ICCA Y.B. COMM. ARB. 736 (1994), is an example of a case where a national court dealt with the issue of whether to grant an injunction to preserve the status quo. The case went on appeal to the court of first instance to the Court of Appeal, and then to the highest English court, the House of Lords. Each court gave a different answer to the question posed. For a discussion of the Channel Tunnel case, see Claude Reymond, *The Channel Tunnel Case and the Law of International Arbitration*, 109 LAW Q. REV. 337, 341 (1993).

120. *See* BORN, *supra* note 112, at 921.

121. *See, e.g.*, Sperry International Trade, Inc. v. Government of Israel, 689 F.2d 301 (2d Cir. 1982).

122. *See* CRAIG ET AL., *supra* note 58, at 469. For a discussion of how the ICC address security for costs issues, see *id.* at 467–69.

123. *See* RUBINO-SAMMARTANO, *supra* note 28, at 631–32.

124. *See* Bosch, *supra* note 75, at 4.

terim order as an offensive weapon.[125] The interim order can be used to exert pressure on the opponent by threatening the seizure of its assets abroad.[126] Moreover, interim proceedings may also be used as dilatory tactics to stay the general progress of the arbitration.[127] Thus, the proper determination of the issue of interim measures of relief is critical to any successful international arbitration.

IV. INSTITUTIONAL RULES AND INTERIM MEASURES

A. Generally

While the different sets of rules of each arbitral institution are fairly similar, the problem of interim measures of protection is not effectively addressed by any of the various institutional rules. Although arbitration rules may provide for the issuance of interim measures of relief, there has been no uniform practice among arbitral tribunals in granting or denying such relief.[128] Instead, some arbitral tribunals grant interim measures, others explicitly do not, and some tribunals direct parties to national courts for resolution of interim awards.[129] Tribunals refer parties to courts because arbitral tribunals possess no coercive power for enforcement of their interim orders, and because provisional remedies can only be properly enforced through the court system.[130] Although interim measures can be coercively enforced through the courts, presenting arbitral orders to courts is often problematic.

B. The UNCITRAL

The UNCITRAL Arbitration Rules contain a single provision that expressly permits arbitral tribunals, as well as courts, to order interim measures of protection.[131] While the UNCITRAL

125. *Id.*
126. *Id.*
127. *Id.*
128. *See* Larsen, *supra* note 5.
129. *See* RUBINO-SAMMARTANO, *supra* note 28.
130. *See* Bosch, *supra* note 75.
131. UNCITRAL, Article 26(1) states:

> At the request of either party, the arbitral tribunal may take interim measures it deems necessary in respect of the subject matter of the

Rules allow for both direct arbitral award of interim relief as well as court awarded relief, the Rules provide no guidance as to the enforcement of measures.[132] The Rules provide no coercive power to the arbitral tribunal for enforcement of any interim measures of relief.[133]

C. The ICC

The ICC Rules also do not effectively address the problem. The ICC Rules were amended in 1998 to add that, "at the request of a party, [the tribunal should] order interim or conservatory measures it deems appropriate."[134] While this provision permits the arbitral tribunal to grant interim measures, the ICC Rules possess no enforcement mechanism. Although parties may be reluctant to disregard arbitral tribunal decisions, the ICC Rules do not provide for sanctions against parties who remain recalcitrant and do not follow such orders.[135]

D. The AAA

Section 22 of the AAA International Arbitration Rules ("AAA Rules")[136] allows arbitral tribunals to grant interim measures.[137] Parties to an arbitration agreement are also entitled to request provisional relief from public courts.[138] This entitlement comes

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> dispute, including measures for the conservation of goods forming the subject matter in the dispute, such as ordering their deposit with a third person or the sale of perishable goods.

132. *See* BINDER, *supra* note 51

133. *Id.*

134. DERAINS, *supra* note 40, at 274.

135. *Id.*

136. AAA International Arbitration Rules, *supra* note 21, § 22.

> At the request of any party, the tribunal may take whatever interim measures it deems necessary in respect of the subject matter of the dispute, including measures for the conservation of the goods which are the subject matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

Id.

137. Rule 34 of the AAA Commercial Arbitration Rules states: "[t]he arbitrator may issue such orders for interim relief as may be deemed necessary to safeguard the property that is the subject matter of the arbitration without prejudice to the rights of the parties or to the final determination of the dispute."

138. *See* Bosch, *supra* note 75, at 10.

from Rule 34 and Section 22(3).[139] Pursuant to Section 22(3) of the AAA Rules, court proceedings seeking provisional relief will never constitute a waiver of the underlying arbitration proceedings.[140]

E. The LCIA

In LCIA arbitration, the arbitrator can order the preservation, storage, or sale or other disposal of any property or thing under the control of any of the parties.[141] In addition, the parties in LCIA arbitration are free to request pre-award conservatory measures from a competent public court.[142] The LCIA Rules grant arbitrators authority to order a party to provide "security for legal or other costs," and "upon such terms as the Arbitral Tribunal considers appropriate," including the provision of a cross-indemnity.[143] Arbitrators may order sanctions against a party that fails to comply with an order to provide security, by staying or dismissing that party's claims or counterclaims in an award.[144] Another provision indicates that the arbitral tribunal has exclusive jurisdiction to order security for legal and other costs.[145]

F. International Arbitration Treaties

In addition to consulting the arbitration agreement, various institutional arbitration rules, and any applicable national laws, parties must also take into account any applicable inter-

139. *Id.* Section 22(3) provides: "[a] request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate."

140. *Id.*

141. *See* LCIA Rules, *supra* note 22, art. 13.1.

142. *See* Bosch, *supra* note 75, at 11–12. Article 15.4 of the LCIA Rules provides that, "[w]ithout prejudice to the right of any party to apply to a competent court for pre-award conservatory measures (except those referred to in Art 15.), the tribunal shall also have the power to order any party to provide security for all or part of any amount in dispute in the arbitration." LCIA Rules, *supra* note 22, art. 15.4.

143. *See* Gregoire Marchac, *Interim Measures in International Commercial Arbitration under the ICC, AAA, LCIA, and UNCITRAL Rules*, 10 AM. REV. INT'L ARB. 123, 125 (1999).

144. *Id.* at 129

145. *Id.* at 130.

national arbitration conventions or treaties.[146] Unlike the institutional arbitration rules previously set forth, the New York Convention has no provision expressly referring to awards of provisional measures by arbitrators.[147] While the 1961 European Convention[148] provides that "[a] request for interim measures or measures of conservation addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement, or regarded as a submission of the substance of the case to the court,"[149] the New York Convention is silent as to interim measures. In fact, some U.S. courts have interpreted Article II(3)[150] of the New York Convention to preclude courts from granting pre-award attachments based upon the intent of the New York Convention to prevent significant judicial intervention until after an arbitration award is made.[151] However, there is also the sentiment, based on Article VI(1)(e),[152] that the New York Convention has a permissive attitude toward court enforcement of provisional remedies in arbitration.[153] In the

146. *See* BORN, *supra* note 112, at 921.

147. *Id.* at 922.

148. European Convention on International Commercial Arbitration, 484 U.N.T.S. 364 (1963) [hereinafter EC].

149. *See id*. art. VI(4).

150. The EC, Article II(3) provides:

> The court of a contracting State, when seized on an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that said agreement is null and void, inoperative or incapable of being performed.

Id. art. II(3).

151. *See* McCreary Tire & Rubber Co. v. CEAT, 501 F.2d 1032 (3d Cir. 1974); Cooper v. Ateliers de la Motobecane S.A., 456 N.Y.S.2d 728 (1982). *But see*, Carolina Power & Light Co. v. Uranex, 451 F. Supp 1044 (N.D. Cal. 1977).

152. EC Article VI(1)(e) provides:

> If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on application of the party claiming enforcement of the award, order the other party to give suitable security.

EC, *supra* note 148, art. VI(1)(e).

153. *See* Bernado M. Cremades, *Is Exclusion of Concurrent Courts' Jurisdiction over Conservatory Measures to be Introduced through a Revision of the Convention?*, 6 J. INT'L ARB. 105 (1989).

absence of uniform provisions on this issue in the New York Convention, each country must determine whether, and under what conditions, such measures can be taken by its own courts.[154]

G. Specific Difficulties in Granting Interim Measures in Arbitration

The contractual nature of arbitration gives rise to several unique difficulties. First, a common difficulty in arbitration occurs when resolution of the dispute involves a third party.[155] Issues often arise when interim measures are needed in the form of orders that have an effect on those who are not party to the agreement to arbitrate. Moreover, when a third party witness' testimony is needed, there are few legal or practical means for the arbitrators to compel such testimony.[156] Secondly, when interim measures of protection are needed against one of the parties to the arbitration, issues arise as to the availability of such remedies when they are sought at early stages in an arbitral proceeding.[157]

Generally, the arbitral tribunal, if it is empowered by the respective governing rules, only has the power to grant interim measures of relief to the parties who are subject to the arbitration. In other words, one significant problem of international arbitration is that a third party, who may possess necessary information or vital assets, cannot be subject to interim measures because that third party has not agreed to be bound by the arbitration. For example, in *Lance Paul Larsen v. Kingdom of*

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154. *See* REDFERN & HUNTER, *supra* note 86, at 712–13. For arguments for and against revision of the New York Convention, see Cremades, *supra* note 153 (arguing for further development of international arbitration law and no revision of the convention), and V.V. Veeder, *Provisional and Conservatory Measures*, *in* ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION, EXPERIENCE AND PROSPECTS 22 (1999) (arguing for a supplemental convention, to allow enforcement of interim measures).

155. *See* Bernardini, *The Powers of the Arbitrator, in* CONSERVATORY MEASURES, *supra* note 101, at 21.

156. *See* Lawrence W. Newman, *International Arbitration Unfinished Business*, 225 N.Y. L.J., Apr. 3, 2001, at 1 [hereinafter Newman I].

157. *See* Lawrence W. Newman and Michael Burrows, *Provisional Remedies in Aid of Arbitration*, 212 N.Y. L.J., Dec. 29, 1994, at 3 [hereinafter Newman II].

Hawaii,[158] an arbitration conducted by the Permanent Court of Arbitration, the tribunal decided that the basis of the dispute was the treatment of the plaintiff by the U.S.[159] Moreover, the tribunal noted that the respondent requested interim measures of protection against the U.S.[160] The tribunal explicitly stated that it lacked jurisdiction to award interim measures against non-parties.[161] Therefore, one of the apparent difficulties of interim measures in the international arbitration context is the inability to apply these types of measures to third parties.

Parties to arbitration also face difficulties when one party seeks interim relief at an early stage of the proceeding. In arbitration, it is typically difficult to obtain such relief expeditiously, because the arbitral tribunal has not yet been constituted.[162] As a result, a party in need of provisional relief can obtain it only in the regular courts. If a party seeks to delay the opposing party's request for an injunction or attachment, that party can slow the process considerably by taking a long time to select an arbitrator. There are times when parties need immediate recourse, i.e., to enjoin an imminent action, and the arbitration procedure simply does not accommodate this need. Thus, most parties in need of this immediate assistance seek the aid of national courts for this emergency relief.[163] However, as the parties go to court, they encounter another different realm of problems with court issuing interim measures.

When parties seek interim relief in national courts, they are confronted with several difficult issues. First, some U.S. courts have ruled that provisional relief is not available from a court

158. Lance Paul Larsen v. Kingdom of Hawaii, PCA Arbitration, *available at* http://pca-cpa.org/ENGLISH/RPC/#Larsen.

159. *See* Award, Lance Paul Larsen v. Kingdom of Hawaii, Procedural Order 6.2(10), *available at* http://www.pca-cpa.org/PDF/LHKAward.pdf.

160. *Id.*

161. *See id*. at Procedural Order 3.

162. *See* Newman I, *supra* note 156.

163. *See* Richard Allan Horning, *Interim Measures of Protection; Security for Claims and Costs; and Commentary on the WIPO Emergency Relief Rules (In Toto)*, 9 AM. REV. INT'L ARB. 155 (1998). The need for emergency relief is particularly pervasive in the context of intellectual property and technology law. In the world of intellectual property, speed is God, and when dealing with infringing patent, copyright, or intellectual property rights, emergency relief is especially needed because the infringement is hard to detect and difficult to quantify in monetary terms. *See id.*

when the parties have provided for arbitration.[164] Secondly, courts that do provide provisional relief in such cases have ruled that a party that seeks relief in court waives its right to arbitrate.[165] Furthermore, the losing party in a motion before a court may have a right to appeal, and through appeal may slow the arbitration process considerably.[166] Thus, the difficulty posed by the need for interim relief in the early stage of the arbitration is not resolved by recourse to courts. Instead, recourse to courts tends to cause, rather than resolve, problems for the parties to the arbitration.

H. The Problem in the U.S.

Currently, the different institutional rules, national arbitration laws, and judicial precedents, are varied and in disarray. The state of international arbitration in the U.S. is a typical example of the perplexing nature of the law. Federal courts disagree over the effect of the New York Convention on the authority of national courts to grant provisional relief in aid of international arbitration. *McCreary Tire & Rubber Co. v. CEAT, Spa*[167] is the seminal decision holding that Article II(3) of the New York Convention forbids court-ordered provisional relief in aid of arbitration. In short, the U.S. Court of Appeals for the Third Circuit, in *McCreary,* concluded that McCreary's judicial action for provisional relief was in fact designed to frustrate the arbitral process that it had agreed to and, therefore, the New York Convention precluded the suit and the request for attachment.[168] The plain language of *McCreary* is that Article II(3) divests a national court of jurisdiction to order attachment in aid of arbitration, or to do anything else other than to compel arbitration. As the *McCreary* court stated, "the purpose of the [New York] Convention will be best carried out by restricting pre-arbitration judicial action to determining whether arbitration should be compelled."[169] Some state courts have also fol-

164. *See* McCreary Tire & Rubber Co. v. CEAT, 501 F.2d 1032 (3d Cir. 1974).
165. *Id.*
166. *See* Garnett, *supra* note 6, at 15.
167. *McCreary Tire*, 501 F.2d 1032.
168. *See* BORN, *supra* note 112, at 937.
169. *McCreary Tire*, 501 F.2d 1032.

lowed the *McCreary* rationale. In *Cooper v. Ateliers de la Motobecane, S.A.,*[170] the New York State Court of Appeals interpreted the New York Convention, as purportedly requiring courts "seized of" matters that are the subject to agreements to arbitrate to refer the matter to arbitration without addressing the substance of those matters. In fact, a number of lower federal courts have also followed the *McCreary* rationale.[171]

On the other hand, a number of cases have rejected the rationale of *McCreary* and held that Article II(3) permits court-ordered attachments in aid of international arbitration. In *Carolina Power & Light Co. v. Uranex,*[172] a federal district court suggested that coercive remedies and other court-ordered intervention available only through courts may often facilitate the arbitration process rather than denigrate it. Thus, the court held that resort to courts for interim measures is not necessarily inconsistent with the reference of the merits of the dispute to arbitration.[173] In addition, the court held that "nothing in the text of the [New York] Convention itself suggests that it precludes pre-judgment attachment."[174] The weight of lower U.S. court authority has followed *Carolina Power* and rejected the premise that Article II(3) flatly forbids all court-ordered provisional measures in aid of arbitration.[175] However, the U.S. Supreme Court has not ruled on the issue.

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170. Cooper v. Ateliers de la Motobecane, S.A., 57 N.Y.2d 408 (1982).

171. A number of lower courts have followed the holding of *McCreary* in holding that Article II(3) of the Convention prohibits national courts from ever ordering attachments in aid of an international arbitration that is subject to the Convention. *See* I.A.T.D. Assoc. Inc. v. Podar Bros., 636 F.2d 75 (4th Cir. 1981); Metropolitan World Tanker Corp. v. P.N. Pertambangan Minjakdangas Bumi Nasional, 427 F.Supp. 2 (S.D.N.Y. 1975) (attachment); Drexel Burnham Labert, Inc. v. Ruebsamen, 139 A.D.2d 323 (1st Dept. 1988); Shah v. Eastern Silk Industries, Ltd., 493 N.Y.S.2d 150 (App. Div. 1985).

172. *See* Carolina Power & Light Co. v. Uranex, 451 F. Supp 1044 (N.D. Cal. 1977).

173. *Id.*

174. *Id.*

175. For other lower court decisions adopting the *Carolina Power* position, see Daye Nonferrous Metals Co. v. Trafigura Beheer BV, 1997 WL 375680 (S.D.N.Y. 1997) (granting injunctive relief against transfers of funds, in aid of arbitration in Paris); Alvenue Shipping v. Delta Petroleum (U.S.A.), Ltd., 876 F. Supp 482, 487 (S.D.N.Y. 1994) (granting preliminary injunctive relief in aid of arbitration in New York Convention signatory); Filantro Spa v. Chilewich

U.S. courts have also disagreed over the effect of national legislation on the authority of national courts to grant provisional relief in aid of international arbitration. The U.S. Court of Appeals for the Second Circuit has explicitly allowed courts to attach property in international arbitrations. In *Borden Inc. v. Meiji Milk Products Co.*[176], the court held that "entertaining an application for a preliminary injunction in aid of arbitration is consistent with the court's power under Chapter 2 of the Federal Arbitration Act."[177] On the other hand, some courts have held that court-ordered provisional measures are not available under the FAA. The U.S. Court of Appeals for the Eighth Circuit, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey,*[178] held that absent an agreement permitting court-ordered provisional measures, the "unmistakably clear congressional purpose" was to bar such measures.[179]

Finally, in the U.S., state arbitration legislation also has an impact on interim measures in international arbitration. The New York Civil Practice Law and Rules ("N.Y.C.P.L.R.") is particularly anomalous in the realm of permitting attachments or injunctions in international arbitration. The New York State Legislature enacted a provision, now N.Y.C.P.L.R. Section 7502(c),[180] which, on its face, permits provisional remedies in aid of arbitration. Section 7502(c) reads: "[t]he Supreme Court in the county in which an arbitration is pending . . . may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief."[181] However, the "wrapper" of the bill, which became N.Y.C.P.L.R. Section 7502(c), contained a notation, in the nature of legislative history, that limited the scope of the provi-

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Int'l Corp., 789 F. Supp 1229 (S.D.N.Y. 1992) (McCreary is "facially absurd"), *appeal dismissed*, 985 F.2d 58 (2d Cir. 1993).

176. Borden Inc. v. Meiji Milk Products Co., 919 F.2d 822 (2d Cir 1990).

177. *Id*. at 826.

178. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey, 726 F.2d 1286 (8th Cir. 1984).

179. *Id.* at 1290.

180. *See* N.Y.C.P.L.R. § 7502(c).

181. *Id.*

sion to domestic arbitration.[182] The New York Court of Appeals' interpretation of the provision is consistent with the legislative history. However, in N.Y.C.P.L.R. Section 6202,[183] the rules permit attachments of the assets of persons not residents or domiciliaries of New York or not qualified to do business in the state. The rationale is evidently that individuals and corporations without a presence in New York are those who are likely to remove their assets from the state.[184] The limitation on the scope of Section 7502(c) makes attachments in aid of arbitration available only in a special class of cases, those in which domestic defendants are regarded as likely to remove their assets from New York.[185]

The problem of national court authority to grant interim measures in aid of arbitration is clear. In the U.S. alone, courts disagree over the authority granted by international agreements, national legislation, and state legislation. In addition to international agreements, national legislation, and state legislation, consideration also must be given to the specific institutional arbitration rules chosen by the parties. All too often, in the context of interim measures of relief, there is disagreement over interpretation of any of these several sources of arbitration law. A solution that would provide a uniform approach to the granting and enforcement of interim measures of relief in aid of arbitration would solve a clear conflict in international arbitration law.

V. APPROACHES TO SOLVING THE PROBLEM

Effective interim relief in arbitration requires cooperation between parties subject to arbitration and the courts. While arbitration is a result of a private contractual agreement and its settlement is handled outside of court, the court system frequently becomes involved. Courts are often involved with arbitration because arbitrators lack the power to enforce orders. As the effectiveness of an interim measure of protection depends, in the end, on its enforceability, court support may be needed. The critical question is how to best apply interim measures of

182. *See* Newman I, *supra* note 156.
183. *See* N.Y.C.P.L.R. § 6202.
184. *See* Newman I, *supra* note 156.
185. *Id.*

protection, with their need for enforcement sanctions, to the realm of arbitration.

Jurisdictions apply several approaches to addressing the issue of interim measures in aid of arbitration. First, some jurisdictions, most notably England, apply the court subsidiarity approach. In this approach, parties seek to obtain interim measures through the arbitral tribunal and look only to the courts as a last resort.[186] Second, other jurisdictions allow parties the free choice of applying for interim measures of relief from either arbitral tribunals or national courts.[187] The UNCITRAL M.L., as well as states such as Germany and Hong Kong, institutes the free choice model.[188] Finally, a small number of states continue to rule that arbitrators are completely restricted from granting interim measures.[189]

A. Court Subsidiarity Model

The arbitration law of England presents an original approach to addressing the issue of interim measures in aid of arbitration. Jan K. Schaefer calls this approach "the court subsidiarity model."[190] England passed the 1996 Arbitration Act in an effort to make the law on arbitration simpler and clearer, and to promote arbitration in their country.[191] Until the Arbitration Act of 1996 was passed, arbitration law was a mixture of common law and statute, and it was necessary to refer to the Arbitration Acts of 1950, 1975, and 1979, as well as a voluminous body of case law.[192] Instead of adopting the UNCITRAL M.L., which

186. *See infra* text accompanying notes 189–219.

187. *See infra* text accompanying notes 220–37.

188. *See* Jan K. Schaefer, *New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German, and Hong Kong Law Compared*, 2.2 ELECTRONIC J. COMP. L. (1998), *at* http://www.ejcl.org/22/art22-2.doc.

189. Italy and Greece represent jurisdictions that do not permit arbitral tribunals to grant any form of interim relief.

190. *See* Schaefer, *supra* note 188, § 1.

191. *See* David Fraser, *Arbitration of International Commercial Disputes Under English Law*, 8 AM. REV. INT'L ARB. 1 (1997).

192. For background on the Arbitration Act of 1996, see Jonathan Hill, *Some Private International Law Aspects of the Arbitration Act 1996*, 46 INT'L & COMP. L.Q. 274 (1997).

was significantly different from existing English law, the legislature decided to amend its own law.[193]

The new English law adopted a relatively original approach with regard to interim measures of protection in arbitration. The Arbitration Act of 1996 established a system of court subsidiarity. The underlying philosophy regards the court as the last resort.[194] The ability to grant interim relief is first allocated to the arbitrator.[195] The parties may agree to give the tribunal the power to order, on a provisional basis, any relief which it could grant in a final award.[196] However, if the parties do not so agree, then the tribunal has no such power.[197] The parties may also, subject to the mandatory provisions of the Act, regulate the conduct of their arbitration by reference to institutional rules.[198] The parties have great autonomy under the English Arbitration Act; they may agree to allow a tribunal the power to grant interim injunctions, but such power will not be vested in a tribunal unless the parties so agree.[199]

Sections 38 and 39 allow parties the ability to grant the arbitrators competence to order interim measures of relief.[200] Section 38 confers upon the arbitrator the power to preserve evidence, order security for costs, and other general powers.[201] Section 39 confers upon the arbitral tribunal the power to grant provisional orders.[202] Section 39 must be read in conjunction with Section 48, which contains the remedies an arbitrator can grant in an award. Section 39(1) makes available, upon party agreement, the arbitrator's power to grant, provisionally, any remedy that the arbitrator could grant in a final award under Section 48.[203] Section 66(1) allows parties to seek the aid of courts for the enforcement of arbitral orders made under Sec-

193. *See* Fraser, *supra* note 191, at 3–4.

194. *See* Schaefer, *supra* note 186, § 4.1.2.1.

195. *See* David Brynmor Thomas, *Interim Relief Pursuant to Institutional Rules Under the English Arbitration Act 1996*, 13 ARB. INT'L 405 (1997).

196. Arbitration Act of 1996 § 39(1), *reprinted in* 36 I.L.M. 155 (1997) [hereinafter Arbitration Act].

197. *Id.* § 39(4).

198. *Id*. § 4(3).

199. *See* Thomas, *supra* note 195.

200. Arbitration Act, *supra* note 196, §§ 38, 39.

201. *Id*. § 38.

202. *Id*. § 39.

203. *See* Schaefer, *supra* note 188, § 4.1.2.2.

tion 38 or 39.[204] In the alternative, parties may seek to enforce a provisional order through the application of Section 42. Under Section 42, the court may make an order requiring a party to comply with a peremptory order of the tribunal.[205] However, this may only be sought by the tribunal or by a party with the tribunal's permission, unless the parties have agreed that the court's powers under Section 42 will be available.[206] Before granting court enforcement of the arbitral award, courts are required to determine that all possible arbitral forums and methods to obtain enforcement have been exhausted.[207]

In the court subsidiary approach, the court can only step in to grant interim measures under certain preconditions.[208] Section 44 of the Arbitration Act governs "court powers exercisable in support of arbitral proceedings."[209] Section 44(5) is the crucial provision governing a court's power to grant interim measures in aid of arbitration.[210] Section 44(5) provides, "[i]n any case the court shall act only if or to the extent that the arbitral tribunal and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively."[211] Schaefer has called this section the "effectiveness test." The test is designed to determine if the court has jurisdiction to hear the claim for interim relief.[212] A party may wish to seek an interim measures from a judge for reasons of speed or immediate enforceability. However, as well as persuading the judge that it is entitled to the interim measures, the party will also have to prove, based on Section 44(5), that the tribunal has no jurisdiction to make the interim measures or that it is unable for the time being to act effectively.[213]

204. *See* Thomas, *supra* note 195, at 407.
205. Arbitration Act, *supra* note 196, § 42.
206. *See* Thomas, *supra* note 195, at 407.
207. *Id.*
208. *See* Schaefer, supra note 188, § 4.1.2.1
209. Arbitration Act § 44.
210. *See* ROBERT MERKIN, ARBITRATION ACT 1996, AN ANNOTATED GUIDE (1996).
211. Arbitration Act, *supra* note 196, § 44(5).
212. *See* Schaefer, *supra* note 188, § 4.1.2.1
213. *See* Thomas, *supra* note 195, at 408.

Moreover, in English Arbitration law, *ex parte* Mareva injunctions[214] and Anton Piller orders[215] are crucial weapons in the arsenal of a claimant. Mareva injunctions and Anton Piller orders are granted *ex parte* and only in cases where the party seeking the injunction demonstrates urgency. These measures may only be granted by courts, and not arbitrators, even if the parties agree to allow arbitrators that power.[216] Section 44's exceptions do not apply; parties may apply directly to courts, without tribunal approval, and may seek these measures even if the arbitral tribunal is not yet constituted.[217]

The benefits of the court subsidiary model are clear. To limit court intervention as far as possible serves the needs of arbitration because court applications can seriously delay and hamper private dispute resolution.[218] However, in most cases, court involvement is inevitable, especially during the enforcement stage. The English Act takes this into account when it provides for a special enforcement mechanism for arbitrator-granted interim relief.[219] However, the "effectiveness test" confers upon the courts the decision of whether the arbitral tribunal has jurisdiction to order interim measures. Schaefer argues that it is the parties who are in the best position to determine if the arbitral tribunal should have the power to order such measures.[220]

214. *See* Adam Johnson, *Interim Measures of Protection under the Arbitration Act 1996*, 1 INT. A.L.R. 9–18, 14 (1997). An *ex parte* Mareva injunction is an order directed to the defendant that prevents him from dealing with his assets pending judgment or, in the arbitration context, pending award. Such an injunction is often coupled with an order requiring the defendant to disclose information and documents concerning his assets. Mareva injunctions are often urgent, and conducted in an *ex parte* setting, without notice to the defendant.

215. *See id.* The Anton Piller order is an order issued by a court to preserve evidence. First developed in cases in the intellectual property context, in which potential defendants who were given notice of proceedings would often seek to prevent the successful prosecution of claims against them by destroying any offending materials in their possession, an Anton Piller order is a type of search and seizure order that requires the applicant or his representatives to be given access to the defendants premises to search for and retain in safekeeping documents or other materials relevant to the action which might otherwise be destroyed.

216. *See* Schaefer, *supra* note 188, § 4.1.2.1

217. *See* Johnson, *supra* note 214, at 14–15.

218. *See* Schaefer, *supra* note 188, § 5.1.1.

219. *See id*. § 4.1.2.1.

220. *See id*. § 5.1.1.

Indeed, this new approach, although intended to cut back on court involvement and make arbitration simpler and clearer, may not accomplish its goals. The "efficiency test" and "urgency test"[221] could further stimulate dispute over interpretation and therefore be a source of delay and frustration. The approach is not without its drawbacks.

B. Free Choice Model

In the free choice model[222] of interim relief, a party has the choice to apply either to the court or to the arbitral tribunal to obtain the measure of protection sought. There are no restrictions imposed on court access and there is no need for a party to seek permission from the arbitrator to apply to the court. The UNCITRAL M.L. is an example of a free choice model because the M.L. allows access to both arbitral tribunals and courts in seeking interim relief.[223] The free choice model and the UNCITRAL M.L. are designed to provide a maximum degree of party autonomy.[224] Unlike the court subsidiary model, which reserves the court as last resort and gives courts the ultimate decision-making power over whether an arbitral tribunal has the power to issue interim measures, the free choice model leaves the choice to the parties. The parties are autonomous in deciding by agreement the various aspects of their arbitration, including whether to seek interim measures of relief from courts or the arbitral tribunal.

In 1998, Germany adopted the UNCITRAL M.L. and accordingly changed its arbitration regime to accept the legitimacy of interim orders issued by arbitral tribunals.[225] Germany may

221. Arbitration Act, *supra* note 196, § 44(4). The "urgency test" is used to determine if an application for interim measures of protection is needed immediately, such as a freezing of bank accounts to prevent asset dispersion, or if the remedy is non-urgent, where the speed of the order is not as essential. *See* Schaefer, *supra* note 188.

222. Jan Schaefer calls the German arbitration law the "free-choice" approach to interim measures of protection. *See* Schaefer, *supra* note 188, § 1.

223. UNCITRAL Model Law, *supra* note 21, art. 17. *See also* BINDER, *supra* note 51.

224. *See* Dr. Klaus Peter Berger, *The Implementation of the UNCITRAL Model Law in Germany*, 13 MEALEY'S INT'L ARB. REP. 38 (1998) [hereinafter Berger I].

225. *See* Dr. Klaus Peter Berger, *Germany adopts the UNCITRAL Model Law*, 1 INT. A.L.R. 121–26 (1998) [hereinafter Berger II].

have been motivated to pass this new law because, despite the country's economic strength, stability, and modern infrastructure, the state was an unpopular arbitration venue.[226] Germany adopted the UNCITRAL M.L. in an attempt to demonstrate that the German legal system espouses international standards of arbitral law and practice.[227] The hope is expressed that a modern and easily acceptable framework will attract arbitration parties to Germany.[228] As a result of this change, Germany is now a state that follows the free choice model approach to interim measures of relief. Under the old German arbitration law, arbitral tribunals were unable to issue interim measures of protection.[229] Interim orders issued by arbitral tribunals were previously regarded as unenforceable awards.[230] However, under the modified M.L. regime, interim measures are available and not restricted to relief contained in the German Code of Civil Procedure.[231]

In the German free choice model, the arbitrator may grant interim measures of relief only at the request of a party.[232] The arbitrator's ability to grant interim measures is discretionary.[233] The parties may also, under Section 1033, seek interim measures of relief from the courts.[234] The court ordered measures of protection are not discretionary — if certain preconditions are

226. *See The New German Law on Arbitration*, 9 WORLD ARB. & MEDIATION REP. 45 (1998). *See also* Schaefer, *supra* note 188, § 4.2.1. For example, 90% of all ICC arbitration between 1980 and 1982 were held in Europe; however, in only 2.5% of the cases was Germany the chosen forum. *See* Bosch, *supra* note 75.

227. *See* Berger I, *supra* note 224, at 45.

228. *Id.*

229. *Id.*

230. *Id.*

231. *See* Berger I, *supra* note 224, at. 45. In fact, German arbitral tribunals may have the power to order Mareva injunction-type remedies which are unknown to the German Code.

232. *See* Section 1041, German Code of Civil Procedure (Zivilprozessordnung), 10th Book, *Bundesgesetzblatt* I (1997) 3324, *reprinted in* INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, Annex I (Jan Paulsson ed., 2002), *available at* http://www.dis-arb.de/materialien/schiedsverfahrensrecht98.html (German version). For an unofficial translation and commentary on the German Arbitration Law, see also *The New German Law on Arbitration*, 9 WORLD ARB. & MEDIATION REP. 45 (1998).

233. *Id.*

234. *See* German Code § 1033.

met, the court has to order the measure.[235] This difference gives an advantage to non-discretionary, court ordered relief. The policy of free choice is taken seriously because parties can choose to opt for the riskier arbitral tribunal granted interim measures, or can go through a possibly longer, more expensive route of seeking court ordered interim protection.[236] Despite the difference, the German model tries to make the two choices equally as effective through enforcement of the orders by the courts. Section 1041(2) allows the court to permit enforcement of interim measures granted by arbitral tribunals.[237] In a unique solution to cross-border arbitration problems, Section 1062(2)[238] also gives competence to a court to enforce an arbitrator's interim order, even if the seat of arbitration is outside of Germany.[239] The German arbitration laws are a very good example of an attempt to create a free-choice model approach to interim measures of protection.

For a free choice model to be successful, it is necessary for the state, or the national courts, to grant arbitral tribunals wide discretion in the types of interim measures that can be granted. One problem with the free choice model is that most states are reluctant to grant such broad discretion to an arbitral tribunal whose decision is typically not subject to review. Secondly, parties can generally opt out of many provisions, and they may opt out and decide that the arbitral tribunal shall not have the power to grant interim measures, thus eliminating the free choice and limiting the parties' autonomy.

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235. *See* Schaefer, *supra* note 188, § 4.2.2.1.

236. *Id.*

237. *See* German Code § 1041(2).

238. The German Code, Section 1062(2) provides:

> If the place of arbitration in the cases referred to in subsection 1,…,is not in Germany, competence lies with the Higher Regional Court where the party opposing the application has his place of business or place of habitual residence, or where assets of that party or the property in dispute or affected by the measure is located, failing which the Berlin Higher Regional Court shall be competent.

239. *See* Schaefer, *supra* note 188, § 4.2.2.1.

C. No Interim Relief from Arbitrators At All?

A small number of states, including Argentina[240] and Italy,[241] maintain that arbitral tribunals do not have the power to grant interim measures of relief. In these states, interim measures of protection are unavailable through the arbitral tribunal and may only be obtained through recourse to national courts. This approach is flawed because it denies parties the ability to choose whether arbitrators can grant provisional relief, and it inevitably forces parties to resort to courts, while the parties' original intentions were clearly to avoid judicial interference with their dispute.

D. Other Approaches

1. ICC Pre-Arbitral Referee Procedure

The ICC Rules for a Pre-Arbitral Referee Procedure provide the business world with a new procedure through which rapid action may be taken when certain difficulties arise in the course of a contractual relationship.[242] Within the framework of arbitration, this procedure allows urgent orders to be issued even before the proceedings are instituted.[243] Inspired by the French *Juge des referes,*[244] the ICC created a set of rules that allow for a quick provisional decision on urgent matters, that either party must comply with, subject to its right to apply for a review of the decision by the arbitral tribunal or state court.[245]

The appointment of a Pre-Arbitral Referee is provided for before the arbitral proceedings are instituted. Upon application of

240. Argentine National Code of Civil and Commercial Procedure (Codigo Procesal Civil y commercial de la Nacion), Book VI, tit. I, art. 753, *reprinted in* INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, Annex I (Jan Paullson ed., 2002).

241. Italian Code of Civil Procedure (codice civile), Book Four, tit. VIII, Arbitration, as amended by Law n. 25, Jan. 5, 1994, *reprinted in* INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, Annex I, art. 818 (Jan Paullson ed., 2002).

242. *See* DERAINS, *supra* note 40, at 435.

243. *See* RUBINO-SAMMARTANO, *supra* note 28, at 648.

244. The name of the procedure means "judge hearing urgent applications." *See* French Civil Procedural Code, arts. 482–92. See also FOUCHARD, *supra* note 40, at 728–34, for a discussion about the French *refere* provision procedure.

245. *See* RUBINO-SAMMARTANO, *supra* note 28, at 648.

a party to an arbitration agreement, the ICC Court of Arbitration appoints a person to decide on applications for urgent measures only.[246] This procedure takes place before the arbitral tribunal is even composed because the selection of arbitrators tends to slow the process down. The decision of the referee is provisional but binding on the parties. Parties may appeal to the competent jurisdiction (either the arbitral tribunal or state court) for review of the order, but the order is binding upon the parties for a limited period of time.[247] It must be stressed that the Pre-Arbitral Referee procedure may be resorted to only on the basis of a written agreement between the parties.[248] The agreement to submit to a pre-arbitral referee may be made in the relevant contract or at some time thereafter.[249]

Unfortunately, not many parties have taken advantage of the Pre-Arbitral Referee Procedure; thus, there is no clear indication if this resolution is an effective mechanism for solving the problem of interim measures in arbitration. However, the procedure appears inadequate for two reasons. First, the Pre-Arbitral Rules do not apply unless the parties have specifically declared them to be applicable. In most cases, if the agreement has not been made in advance, it is unlikely that disputing parties will agree to an expedited referee procedure. Second, the procedure for appointing a referee may take up to seven days. With regard to certain disputes, especially those related to intellectual property, seven days may not be sufficiently expeditious.[250]

246. *Id.*
247. *See* DERAINS, *supra* note 40, at 435.
248. *Id.*
249. *Id.*
250. *See* Francis Gurry, *The Need for Speed*, *at* http://arbiter.wipo.int/events/conferences/1997/october/gurry.html (discussing, in the context of intellectual property, the need for arbitrators to be available on a twenty-four hour basis to decide urgent interim measures).

2. The WIPO[251] Emergency Relief Rules

The World Intellectual Property Organization ("WIPO") drafted a set of Emergency Relief Rules to be used in conjunction with their own WIPO Arbitration Rules. In the intellectual property context,[252] speed is especially important in the resolution of disputes.[253] Similar to the ICC Pre-Arbitral Referee Procedure,[254] the WIPO Emergency Rules were designed to confront the difficulty that exists, before the constitution of the arbitral tribunal, which is precisely the time at which a party wishes to seek interim relief.[255] The WIPO approach to the lack of availability of interim relief, prior to the constitution of an arbitral tribunal, is different from the ICC Pre-Arbitral Referee approach in several key respects.[256] Most notably, the procedure is integrated at the parties' option, with the conventional arbitration procedure under the WIPO Arbitration Rules, and uses the idea of constituting a standby panel of arbitrators to ensure that an emergency arbitrator can be appointed on twenty-four hours notice.[257] The Emergency Relief Rules do not apply automatically in every case in which parties designate WIPO Arbitration Rules, but instead serves as an optional additional feature to the WIPO Arbitration Rules.[258] Where the Emergency Relief Rules provision is included in the arbitration agreement and one of the parties initiates an application for emergency

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251. The World Intellectual Property Organization (WIPO) is an international organization dedicated to promoting the use and protection of intellectual property. Through its work, WIPO plays an important role in enhancing the quality and enjoyment of life, as well as creating real wealth for nations. With headquarters in Geneva, Switzerland, WIPO is one of the 16 specialized agencies of the United Nations system of organizations. It administers 21 international treaties dealing with different aspects of intellectual property protection. The Organization counts 177 nations as member states. *See* WIPO, *at* http://www.wipo.int/about-wipo.en/ (last visited June 7, 2003).

252. Examples of intellectual property arbitrations could include disputes over injunctive relief sought to prevent disclosure of trade secrets, or to prevent the marketing of a product that infringes upon a patent or a trademark.

253. *See* Gurry, *supra* note 250.

254. *See* discussion *supra*, Part IV.D.1.

255. *See* David D. Caron, *Proposed WIPO Supplementary Emergency Interim Relief Rules*, *at* http://www.law.berkely.edu/faculty/ddcaron/Courses/rpid/rp04069.html.

256. *Id.*

257. *Id.*

258. *See* Gurry, *supra* note 250.

relief, the emergency arbitrator would be appointed from this standby committee of arbitrators.[259] The standby arbitrator committee eliminates the possibility of undue delay by a party through the challenge of arbitrator selection.[260] Instead, the choice of arbitrator in an Emergency Relief application is not up to the parties, but up to the WIPO Arbitration Center to select an arbitrator from a published list of arbitrators.[261] The parties still have the right to challenge the appointment of the arbitrator, but this is limited to a period of twenty-four hours after receiving notice of the appointment.[262]

Furthermore, two forms of application may be brought under the WIPO Emergency Relief Rules, an *ex parte* and *inter partes*.[263] The *ex parte* procedure,[264] one in which the allegedly aggrieved party would seek relief without serving notice or providing for the participation of the other party, is considered essential for those cases in which there is evidence of bad faith on the part of the other party, or an indication that notice would entail the risk that vital evidence might be destroyed or other irreparable damage done.[265] However, an *ex parte* procedure and any order made in it by the emergency arbitrator would not be enforceable under the New York Convention.[266] The order would have contractual status only.[267] However, providing backbone to the procedure, most attorneys would advise their clients to follow the order, even if it is merely backed by contractual status, especially if the order is backed by sanctions of liquidated damages in the event of its breach.[268] The *inter partes* procedure is more common, where parties exchange notice regarding application of the emergency relief rules and both parties are present for the procedure, which is conducted within strict and very short time limits.[269]

259. *Id.*
260. *See* Horning, *supra* note 163.
261. *Id.*
262. *Id.*
263. *See* Gurry, *supra* note 250.
264. *See* WIPO Emergency Relief Rules, art. XIII, *in* COMPARISON OF INTERNATIONAL ARBITRATION RULES, *supra* note 18.
265. *See* Gurry, *supra* note 250.
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*

The WIPO Emergency Relief Rules represent a new frontier in international arbitration.[270] Since the rules are relatively new, there is no indication of whether this evolution of arbitration practice and procedure is well adapted to affording parties reasonable protection of their rights through the arbitration process in emergencies. Nevertheless, the Emergency Relief rules are the most expansive and groundbreaking rules addressing interim measures in arbitration practice.

3. The UNCITRAL Working Group on Arbitration

At its thirty-second session, in 1999, the UNCITRAL had before it a note entitled *Possible Future Work in the Area of International Commercial Arbitration*.[271] The Commission entrusted the work to one of its working groups, which it named the Working Group II (Arbitration and Conciliation) ("Group") and decided that enforceability of interim measures of protection would be one of the priority items the group would consider.[272] From the thirty-third to thirty-sixth sessions, the Group continued to work on the issue of the power of a court or arbitral tribunal to order interim measures of protection.[273] In fact, at the thirty-sixth session, the Group considered a draft text for a revision of Article 17[274] of the UNCITRAL Model Law on International Commercial Arbitration.[275]

The proposed revision of Article 17 contains very important features that define and clarify the arbitral tribunal's power to order interim measures of protection. M.L. Article 17 is general and does not provide parties or arbitral tribunals with any specific guidance.[276] Section (2) of the draft revision of Article 17

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270. *See* Horning, *supra* note 163, at 175.

271. United Nations Commission on International Trade Law [hereinafter UNCITRAL], Report of the Working Group on Arbitration, 37th Sess., U.N. Doc. A/CN.9/523 (2002) [hereinafter UNCITRAL Working Group Report].

272. *Id*.

273. *Id.*

274. UNCITRAL, Arbitration: Interim Measures of Protection, Proposal by the United States of America, U.N. Doc. A/CN.9/WG.II/WP.121 (2002).

275. UNCITRAL Working Group Report, *supra* note 271.

276. *See* UNCITRAL M.L. art. 17. Article 17 provides:

> Unless otherwise agreed to by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measures of protection as the arbitral tribunal may consider necessary in

defines specific powers possessed by the arbitral tribunal.[277] Section (3) sets forth a standard for tribunals to apply when making an interim measures determination.[278] Section (4) sets forth a controversial provision under which tribunals are given the power to make interim orders *ex parte*.[279] For a party to proceed *ex parte*, that party must demonstrate not only the requirements of Section (3), but also demonstrate that proceeding without notice is necessary. Orders granted under the *ex parte* rules would be provisional, expiring in twenty days, and the requesting party would be liable for any costs suffered by the party against whom the measure is ordered (in light of final disposition on the merits).[280] The draft revision of Article 17 also mandates that the requesting party provide security as a precondition to granting the measure and also provide the tribunal with any material change in circumstances on the basis on which the party sought the interim measure.[281] Finally, the draft revision provides that the tribunal may modify or terminate an interim measure at any time.[282]

The Group has also considered the issues of interim measures granted by courts and the recognition and enforcement of interim measures.[283] The Group has done valuable and considerable work in the field of arbitration and the revision of M.L. Article 17 is a great step in resolving the problem of interim measures in international arbitration.

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respect of the subject matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

277. UNCITRAL Working Group Report, *supra* note 271. Section (2) allows tribunals to make orders preserving the status quo, issuing injunctions, providing security for costs, and preserving evidence relevant to the resolution of the dispute. *Id*. § (2).

278. *Id.* Section (3) provides that the tribunal may order interim measures when the requesting party has demonstrated that: (a) there is an urgent need for the measure; (b) irreparable harm will result if the measure is not ordered, and that harm substantially outweighs the harm that will result to the party opposing the measure if the measure is granted; and (c) there is a substantial possibility that the requesting party will succeed on the merits of the dispute. *Id*. § (3).

279. *Id.*

280. *Id*.

281. *Id.*

282. *Id.*

283. *Id.*

VI. RECOMMENDATIONS

A. Amendment of the New York Convention

Although interim measures of protection have been generally enforced by most courts, it is necessary for the New York Convention to be amended to include a specific provision mandating courts of nations bound by the treaty to also recognize and enforce interim measures of relief. Such an amendment would resolve conflicts in nations like the U.S., where some courts have enforced arbitrator-granted interim measures[284] and some courts have expressly denied such enforcement.[285] Because enforcement is one of the most important aspects of a successful arbitration, it is necessary to ensure proper enforcement of the critical interim measures or provisional remedies granted by arbitral tribunals.

B. Add Mandatory Rules Governing the Granting and Enforcement of Interim Measures of Relief to All Institutional Arbitration Rules

Because difficulties in interim measures are most often encountered at the critical, early stages of the proceedings, before the arbitral tribunal has been constituted, it is necessary for all arbitration institutions to adopt procedures similar to the ICC Pre-Arbitral Referee Procedure or the WIPO Emergency Relief Rules, which ameliorate this problem and help ensure the efficacy of arbitration. Due to the contractual nature of arbitration agreements, it may be difficult to enforce these as mandatory provisions. However, it is necessary for institutions to highly recommend these procedures and possibly give some benefit to this provision being added to the agreement. In addition, it is necessary for practitioners to urge their clients to include these vital provisions, which can protect the party's most valuable assets or claims in the arbitration.

284. *See* Carolina Power & Light v. Uranex, 451 F. Supp. 1044 (N.D. Cal. 1977).

285. *See* McCreary Tire & Rubber Co v. CEAT Spa, 501 F.2d 1032 (3d Cir. 1974).

C. Adopt the Proposed Revisions of UNCITRAL Model Law Article 17

The proposed revisions of UNCITRAL Model Law, Article 17 provide an interesting answer to the dilemma posed by interim measures in international arbitration. The proposed revision provides an effective system of arbitrator-ordered, court-enforced, and court-ordered interim remedies that will aid the practice of international arbitration. The revision includes limitations on the power of tribunals and courts to order and enforce interim measures, including certain provisions that limit the length of time interim measures are effective, provide for appeal of interim orders, and limit the ability of a party to obtain interim measures *ex parte*. The UNCITRAL should adopt this revision to the M.L., as it will provide a solution to a perpetual problem to the M.L. and to international arbitration generally.

VII. CONCLUSION

Although interim measures of protection in arbitration have come a long way in recent times and the use of interim measures has proliferated, it is necessary to continue to refine and alter the system to meet the needs of today's ever-changing world of business. To make arbitrations effective, it is necessary to implement some mechanism that can ensure that interim measures can be appropriately granted and enforced. With the aid of national court systems, institutional rules, and practicing international lawyers, the state of interim measures in arbitration has improved greatly. Yet there is still room for improvement.

William Wang[*]

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* Candidate for J.D., Brooklyn Law School, 2003. This note is dedicated to my loving parents, my late father, Frank, and my mother Lucia. I am forever grateful for your love, support, encouragement, and sacrifice.